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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. 1451 Misc.

DONALD LEE MAXWELL,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

FREDERICK J. GRAF
130 East Washington Street
Suite One Thousand
Indianapolis, Indiana 46204

FRANK P. HUSE, JR.
413 Union Federal Building
Indianapolis, Indiana 46204
Attorneys for Petitioner.

Of Counsel:
MARTZ, BEATTEY,
HINDS & WALLACE
130 East Washington Street
Suite One Thousand
Indianapolis, Indiana 46204
Phone (317) 638-3431

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IN THE

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DONALD LEE MAXWELL,

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STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Donald Lee Maxwell, by counsel, Frederick J. Graf of Martz, Beattey, Hinds & Wallace, and Frank P. Huse, Jr., prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Indiana affirming Petitioner's conviction of First Degree Murder returned by jury in the Marion County Criminal Court, Division 2, State of Indiana.

OPINION BELOW

The opinion of the Supreme Court of the State of Indiana is unofficially reported in 260 N.E. 2d 787 (August 4, 1970). It is reproduced in Appendix "A" of this Petition. Rehearing was denied October 13, 1970, without opinion respecting the Petitioner's "Petition for Rehearing" reproduced as supplemented and corrected in Appendix "B".

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of its Rule 19 because the case presents novel questions of interplay of interpretative Indiana state law and the mandates of the Fourteenth Amendment to the Constitution of the United States; also it is invoked under 28 U.S.C., Section 1257(2) and (3).

By order of this Court dated December 21, 1970, the time for filing this petition for certiorari was extended to and including March 12, 1971.

QUESTIONS PRESENTED

1. **Whether or not a one-count indictment by a state Grand Jury informing a person (Petitioner) of his alleged participation (?) in the "suicide" of another person constitutes information of an accusation requiring the Petitioner to answer for a capital crime, namely, first degree murder?**

2. **Assuming,** *arguendo*, **the Petitioner was obliged to answer for a capital crime; whether or not Respondent's (the State's) own uncontroverted trial court evidence that the death by shooting was accidental can be "ignored" by an appellate tribunal (the Indiana Supreme Court) in its review opinion?**

3. **Whether or not a life-time of incarceration may be inflicted upon a citizen (Petitioner) on the basis of inadmissible, unreliable hearsay testimony educed at the citizen's trial and then, thereafter, be shunted aside by the highest state court (of Indiana) on appeal?**

4. **Whether or not issues 1, 2, and 3 above, either jointly or severally, constitute "plain errors or defects affecting substantial rights" of the Petitioner thus depriving him of due process of law under his 14th Amendment rights?**

CONSTITUTIONAL & STATUTORY PROVISIONS

1. The Constitution of the United States of America, Amendment XIV, § 1 (1868) provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Indiana Acts of 1941, ch. 148, § 1, the same being Burns' Anno. Stats. § 10-3401 provides, in part:

> "Whoever purposely and with premeditated malice . . . kills any human being is guilty of murder in the first degree, and on conviction shall suffer death or be imprisoned in the state prison during life."

3. The Indiana Acts of 1905, ch. 169, § 192, the same being Burns' Anno. Stats. § 9-1127 provides, in part:

> "No indictment or affidavit shall be deemed invalid, nor shall the same be set aside or quashed, nor shall the trial, judgment or other proceeding, be stayed, arrested or in any manner affected for any of the following defects:

•••

Sixth. For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged.

•••

Tenth. For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

STATEMENT OF THE CASE

Petitioner submits that the Federal questions were timely and properly raised so as to give the Supreme Court of the United States jurisdiction to review the judgment of the highest state court (of Indiana) on Writ of Certiorari.

Petitioner herein was arrested pursuant to an Indictment charging the occurrence of a "suicide" of one Rainey Hughes, and Petitioner was then tried and convicted of murdering the same Rainey Hughes, by shooting him. A trial by jury in the Marion Criminal Court, Division No. 2, of Indiana, commenced March 17, 1969, resulting in a verdict of guilty of murder in the first degree rendered March 19, 1969. Petitioner moved for a Directed Verdict at the conclusion of the State's Case in Chief. That motion was overruled and, thereafter, Petitioner rested without presenting evidence in his defense. Petitioner is presently incarcerated in the Indiana State Prison pursuant to a commitment of the trial court committing him there for the remainder of his life.

Petitioner filed a Motion for New Trial on April 17, 1969; and, on that same day, the trial court overruled the motion (which motion substantially preserved the Federal questions sought here to be reviewed). He then filed an "Assignment of Errors" with the Supreme Court of Indiana

on July 8, 1969, urging as sole error the trial court's overruling of his Motion for a New Trial.

Petitioner filed an Appellant's Brief on August 9, 1969; Respondent filed an Appellee's Brief on September 4, 1969; Petitioner then filed a Reply Brief on September 24, 1969; and, thereafter, oral argument was heard in the Indiana Supreme Court on November 4, 1969. The Indiana Supreme Court affirmed the trial court judgment in an opinion rendered August 4, 1970, which is reproduced in Appendix "A" of this petition. Petitioner filed a "Petition for Rehearing" with the Indiana Supreme Court on August 21, 1970, again substantially preserving the Federal questions here sought to be reviewed. The "Petition for Rehearing" was denied on October 13, 1970, without opinion. It is reproduced in Appendix "B" of this petition.

Petitioner alleged in his "Petition for Rehearing" the material defects in his indictment, the appellate refusal to consider Respondent's (the State's) own uncontroverted evidence that the shooting of Rainey Hughes was accidental, the appellate failure to review an issue respecting inadmissible hearsay testimony despite six (6) "objections" made at the trial by Petitioner's counsel to a highly prejudicial pattern (or line) of questioning, and that his Constitutional right to due process of law under the Constitutions of the State of Indiana and of the United States of America had been violated.

Petitioner further alleged that the Indiana Supreme Court erred in failing to exercise its judicial authority to go beyond possible technical defects and take notice of plain errors or defects affecting his substantial rights.

The Indictment brought by the Respondent (the State of Indiana) against the Petitioner did and still does read, in substantial and pertinent part:

"***; And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say and charge that the said RAINEY HUGHES, in the manner and form and by the means aforesaid, unlawfully, feloniously, purposely and with premeditated malice did kill and murder the said RAINEY HUGHES, then and there being .... contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana. ***"

The uncontradicted evidence (Petitioner presented no defense evidence) showed that at 4:00 p.m. on Sunday, September 17, 1967, the gunshot victim, one Rainey Hughes, went to a service station co-owned by the Petitioner. The Petitioner, one Snowden Hughes (a son of Rainey Hughes), and John Robbins (a former son-in-law of the deceased) were working on the premises at the time. Two young boys, a Robert Mann and a Floyd Whitlock, were present together at the service station for almost four hours loafing and talking to one another.

Rainey Hughes was shot in the chest with a single bullet fired from a target pistol at around 8:00 p.m.—on September 17, 1967, and he was subsequently taken to a hospital where he died around 2:00 a.m. on September 18th. An autopsy revealed that Rainey Hughes had been drinking a good deal prior to the shooting. Petitioner momentarily left the service station after the shooting while Snowden Hughes administered first aid to his father and John Robbins telephoned the police concerning the incident. Petitioner shortly returned to the service station and handed Police Officer Autrey a .25 caliber 8-shot Omega revolver (State's Exhibit No. 1) and told Officer Autrey that he (Petitioner) had shot Mr. Hughes, that he was sorry, and that the shooting was an accident. The young Mann boy testified that after the fatal shot was fired, he saw Petitioner hand the target pistol to John Robbins. Petitioner

instructed Robbins to call the police. The balance of Mann's testimony was somewhat youthful and confused.

Significantly, Officer Autrey testified that he had no reason to disbelieve the Petitioner's statements given at the scene that the shooting was an accident and that he was sorry that it happened. There was some evidence of earlier target practicing, imbibing liquor, and convivial banter at the service station; however, there was no evidence of a struggle and Rainey Hughes was not otherwise harmed. **This was the State's own uncontroverted evidence!**

A seventh and last witness, Mary Sandra Balay (a daughter of the deceased and ex-wife of State's Witness John Robbins), was called by Respondent to offer "premeditation" testimony. Her uncorroborated testimony concerned that part of a conversation which she partially overheard more than 72 hours prior to the shooting incident. The conversation allegedly took place between her mother and the Petitioner. Mary Balay concluded from the part she overheard that Petitioner threatened her father against ever coming back on Petitioner's driveway. *(This hearsay threat, if in fact it was ever made did not materialize as the State's own uncontradicted evidence clearly demonstrated.)*

Mary Balay's name was not endorsed on the Indictment as having been a witness before the Grand Jury, she was not subpoenaed for the trial of Petitioner, but, rather, her brother (Witness Snowden Hughes) came out to her residence during the course of the trial and talked to her. He told her that the police wanted her to come in and testify. The record reflects that she was not earlier sworn as one of the witnesses ordered to be separated by the trial court, and quite possibly her testimony was not even

given under oath as she did not answer a question addressed to her by the trial judge.

REASONS FOR GRANTING WRIT

The affirmance of the Trial Court judgment by the Indiana Supreme Court rests upon several unjust legal postulates, each necessarily interwoven to reach the shortcut result; and, all of which are not, and should not become, the law of any part (particularly, Indiana) of the land. Compare *Mapp v. Ohio* (1961), 81 S. Ct. 1684, 367 U.S. 644.

The first unjust legal postulate indulged by the Indiana Supreme Court involves its conclusion as to what is "clear from reading the indictment up to the concluding clause (upon which appellant relies)". The indictment, up to the concluding clause, did not then nor does it even today charge Petitioner (Appellant) with committing the first degree murder of Rainey Hughes. One must look to the second clause to find that the allegations contained therein (that is to say, in the second clause) constitute a course of conduct contrary to the statutes of the state and against the peace and dignity of that state (Indiana). *Burns' Anno. Stats.* § 10-3401, *supra.*

It is only the second and concluding clause (that which appears after the semi-colon) which charges, if in fact there is any charge, a crime. **The indictment up to the concluding clause charges nothing.** It therefore does not follow, as a legal postulate, that the concluding clause contains ". . . a mere clerical error", *Burns Anno. Stats.* § 9-1127, *supra.* And, it further does not follow that the second clause is "surplusage" or that it is a "defect or imperfection which does not tend to the prejudice of the substantial rights of the dependent, upon the merits." In this case it would appear that the Indiana Supreme Court has endeavored to stretch the purview of its aforequoted statute *(Burns Anno. Stat.*

§ 9-1127) which is merely intended to cover immaterial defects in charging pleadings. *Ellis v. Dixon* (1955), 75 S. Ct. 850, 349 U.S. 458, 99 L. Ed. 1231, rehearing denied 76 S. Ct. 37, 350 U.S. 855, 100 L. Ed. 759.

This Court held in *Downum v. United States* (1963), 372 U.S. 734, "Each case must turn on its facts." Like a person accused of admitting a Federal crime, one charged with committing a felony and tried in a state court in the State of Indiana is entitled to be informed of the ". . . nature and cause of the accusation . . ." against him. *Constitution of Indiana,* Art. 1, § 13. Petitioner has not been so "informed" and it can hardly be argued that he has been accorded his "substantial rights" in view of the lifetime of incarceration imposed upon the Petitioner. *Cole v. Arkansas,* 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644.

Petitioner has never, to this date, been apprised of the nature of the accusation so as to enable him to prepare a defense. As it has so often been pointed out, courts indulge every reasonable presumption against "waiver" of fundamental Constitutional rights and this honorable Court has stated that it will not presume acquiescence in the loss of fundamental rights. Cf., *Johnson v. Zerbst* (1938), 304 U.S. 458, 58 S. Ct. 1019, and other cases therein cited.

Assuming, *arguendo,* the Petitioner was obliged to answer for a capital crime (*an obligation which he does not concede*), the Indiana Supreme Court once again engages in a false legal postulate. Namely, that an appellate tribunal may with impunity ignore Respondent's uncontroverted evidence pointing to an "accidental" death by shooting.

Petitioner's briefs to the Indiana Supreme Court cited at least six (and possibly seven) specific examples of the

unrebutted testimony of Respondent's Witness Officer Autrey and Witness John Robbins conclusively demonstrating that the unfortunate shooting was but an "accidental" event. The State's appellate tribunal (the Indiana Supreme Court) has chosen to ignore this compelling testimony in its review opinion. The question remains, why? Cf. *U.S. v. Nikrasch* (1966), 367 F.2d 740, 743.

The record does not support a finding that there was adequate admissible evidence tending to prove "purpose" and "premeditated malice" as required by the Indiana Statute defining the offense of murder in the first degree. The highest state court (of Indiana) "assumed" the purposefulness required, it "inferred" the requisite "malice" and, in *reaching out* for "premeditation" the court speaks of a lapse of time about which "there is not testimony as to how long this interval was . . .". This has all the earmarks of building conjecture upon conjecture and it certainly does not enunciate a substantial and legally correct postulate of law.

As in the case of *Yellin v. United States* (1963), 83 S. Ct. 1828, 374 U.S. 109, 10 L. Ed. 2d 778, the factual setting here is for the most part not in dispute. The only dispute in the latter respect is to the *admissability of the testimony of Mary Balay.* In this regard the Indiana Supreme Court evades the issue by asserting (under "C" of its Opinion) that the issue was not before the court on appeal. The record of the proceeding reflects that trial counsel for Petitioner made six (6) separate and distinct objections to testimony given by Mary Balay. **The trial court sustained five (5) of the six (6) objections, but the highly prejudicial "pattern" of the several objectionable questions did, in a manner of speaking, subconsciously "prove premeditation" to the jurors.**

This was obviously prejudicially damaging to the Petitioner, it was before the Indiana Supreme Court on appeal, it raised a most substantial question, it was repeatedly presented upon briefing, *but there has been no decision thereupon.*

This honorable Court stated in *Downum v. United States, supra:*

> "We resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion.' This means that the judgment below must be and is reversed."

For similar reasons Petitioner submits that his conviction in the state courts of Indiana should be reversed. Under all known concepts of "due process of law" as guaranteed to Petitioner, the least that he is entitled to is a remand to the trial court for the purpose of *being properly informed of the nature and cause of the accusation against him.*

CONCLUSION

For all the reasons stated hereinabove, this petition for writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

MARTZ, BEATTEY,
HINDS & WALLACE
130 East Washington Street
Suite One Thousand
Indianapolis, Indiana 46204
Phone (317) 638-3431

FREDERICK J. GRAF
130 East Washington Street
Suite One Thousand
Indianapolis, Indiana 46204

FRANK P. HUSE, JR.
413 Union Federal Building
Indianapolis, Indiana 46204

Attorneys for Petitioner.

APPENDIX "A"

IN THE

Supreme Court of Indiana

(Opinion issued August 4, 1970)

DONALD LEE MAXWELL,

Appellant,

v.

STATE OF INDIANA,

Appellee.

No. 769 S 153

APPEAL FROM MARION CRIMINAL COURT,

DIVISION II

HONORABLE SAUL I. RABB, JUDGE

DeBRULER, J.

This is an appeal from a conviction of First Degree Murder returned by jury in the Marion County Criminal Court, Division 2. The facts which tend to support the verdict are these:

At 4:00 p.m. on Sunday, September 17, 1967, the victim, Rainey Hughes, went to a Gulf Service Station at 3750 E. Prospect Street owned by appellant. Appellant, Snowden

Hughes, the son of Rainey, and John Robbins were working on the premises at the time.

There was animosity between appellant and Rainey Hughes because Rainey's wife was divorcing him to marry appellant. On Thursday, September 14, 1967, Mrs. Hughes and her daughter Mary Balay talked to appellant at his service station at which time he said he would shoot Rainey Hughes if Rainey came up on his drive again.

However, when Rainey arrived Sunday appellant asked Rainey if he wanted a drink and appellant left to obtain some bootleg whiskey. Appellant and Rainey drank together for several hours in an apparently friendly atmosphere. They talked about shooting each other in what one witness described as a joking manner and around 7:00 p.m. they used appellant's pistol to shoot at an oil can in back of the station.

At about this time appellant and Rainey were definitely both under the influence of the whiskey and Rainey said that he was sleepy and intended to go to his home five blocks away. Rainey's wife had a restraining order against Rainey, but apparently he had been living there anyway. Appellant did not want Rainey to go home because Mrs. Hughes did not want him there. Appellant said he would go there and see if it was okay for Rainey to come home. Appellant drove off and came back in a few minutes and said Mrs. Hughes did not want Rainey there and would have him arrested if he showed up. Rainey insisted he was going and appellant insisted he was not. The record does not indicate exactly how long the argument lasted but the two men ended up outside of the station between two cars parked side by side, an unknown distance apart. At this point appellant shot Rainey Hughes in the chest with one shot from appellant's pistol. There was no struggle and Rainey Hughes was not armed.

After he was shot, Rainey walked towards his son, Snowden, said "He shot me", and fell to the ground. John Robbins who had heard the shot and heard Rainey say that to his son and collapse, went to the office to call the police. Appellant, with the gun still in his hand, entered the office and told Robbins to go ahead and call the police. Appellant then drove away in his car. He returned in forty-five minutes to one hour, gave the gun to the police, and said "It was an accident."

A. Appellant's first allegation of error is that there is insufficient evidence to show that appellant "purposely and with premeditated malice" shot Rainey Hughes. In reviewing this allegation this Court will not weigh the evidence nor resolve questions of credibility, but will look to that evidence and the reasonable inferences therefrom which support the verdict of the trial court. The conviction will be affirmed if from that viewpoint there is evidence of probative value from which a reasonable trier of fact could infer that the appellant was guilty beyond a reasonable doubt. *Glover* v. *State* (1970), —Ind.—, 255 N.E.2d 657.

The statute under which appellant was charged says:

> "Whoever purposely and with premeditated malice . . . kills any human being is guilty of murder in the first degree, and on conviction shall suffer death or be imprisoned in the state prison during life." Acts 1941, ch. 148, § 1, the same being Burns § 10-3401.

There was sufficient evidence of purpose in this case. Appellant, without struggle, pointed a gun at an unarmed man's chest and shot him. Appellant is assumed to have intended the natural and probable consequence of his act. *Brown* v. *State* (1969), —— Ind. ——, 247 N.E.2d 76. We can think of no clearer example of what it means to "purposely" shoot another person, than the facts in this case.

Malice could properly have been inferred from the intentional use of a deadly weapon in a manner calculated to cause death. *Yarber* v. *State* (1962), 242 Ind. 616, 179 N.E.2d 882; *Miller* v. *State* (1962), 242 Ind. 678, 181 N.E.2d 633.

There was also sufficient evidence of premeditation by appellant. There was only one eye-witness to the actual shooting, a young man named Robert Mann. He was standing outside the station near the service bays, with a friend of his named Floyd Whitlock. Concerning the shooting, the witness testified:

A. Tell what happened—well, I was standing near the machine, you know, talking to Floyd. Anyway, the defendant and Hughes was walking, you know, and they were arguing, they was. Well, I didn't pay no attention to them, you know, they was arguing, pretty high, they was. Then they walked out on the ramp over to near two cars, they was. They was talking, and so I kept on talking to Floyd. And me and Floyd was looking at them, then we turned around and started talking again. So then when I turned around the next time, the defendant, you know, had a gun on Hughes. So I was still talking to Floyd, and then when I turned around again, that's when the gun went off.

Q. And did you say the defendant had a gun on Hughes? How do you mean, he had a gun on him?
A. He had it pointed at him.

Q. Pointed at him?
A. Yes.

Q. What part of his body was it pointed at?
A. Right up in here.

Q. Up to the chest?
A. Yes.

Q. And then you turned back around, you say?
A. Yes.

Q. And you say them? And when you—after you turned back around, that's when you heard the shot, is that it?
A. I turned back to Floyd and then I turned around, that's when the gun went off.

Q. That's when the gun went off"
A. That's right.

Q. Did you see the defendant, Donald Maxwell, shoot Rainey Hughes?
A. Yes. When I turned around, that's when the gun went off that was in his hand."

Thus, there was a sufficient time interval between appellant's pointing the gun at Rainey Hughes and appellant's pulling the trigger, for appellant to have considered the consequences of his act. In *Everett* v. *State* (1934), 208 Ind. 145, 195 N.E. 77, this Court said:

> "In order that there may be such premeditated malice as will make a killing murder in the first degree the thought of taking life must have been consciously conceived in the mind. the conception must have been meditated upon, and a deliberate determination formed to do the act. Where the homicide has been preceded by a concurrence of will, with an intention to kill, and these are followed by deliberate thought or premeditation, although they follow as instantaneous as successive thoughts can follow each other, the perpetrator may be guilty of murder in the first degree." 208 Ind. 149, 150.

In *Barker* v. *State* (1958), 238 Ind. 271, 150 N.E.2d 680, this Court held:

> "Under the offense charged in this case it was necessary to prove that the appellant killed 'with premiditated' malice. In other words, the proof must show

> the defendant had time to deliberate upon the intent and design to take life. We have said before: "Premeditation by its very nature is not instantaneous but requires some time interval.' *Heglin v. State* (1957), 236 Ind. 350, 140 N.E.2d 98." 238 Ind. at 279, 280.

In that case appellant was brandishing a knife among a group of companions, and just prior to the killing he told the victim during an altercation, "I'll cut hell out of you." There is no indication as to the time lapse occurring between the threat and the killing but it seems to have been relatively short, yet sufficient for the appellant to have deliberated on his intent.

In this case there was similar lapse of time. The witness Mann said he saw appellant with a gun on Rainey. The witness turned around and talked to his friend, and when he turned around again, that's when the gun went off. Although there is no testimony as to how long this interval was, the pointing of the gun and the shooting were not simultaneous, but rather separated by a time lapse, sufficient for appellant to have deliberated upon his intent.

B. Appellant's second contention is that there was insufficient evidence that the body examined by Dr. Petty and about which he testified at the trial, was the body of Rainey Hughes.

Dr. Petty testified at length concerning his examination of the dead body of Rainey Hughes. For example:

> "Q. Now, Doctor, as a result of your examination, can you determine, with reasonable medical certainty, as to what was the immediate cause of death of the deceased Rainey Hughes?
> A. Yes, I can.

Q. And what is that?
A. The cause of death was, specifically, massive internal bleeding, secondary to a gunshot wound of the chest and the abdomen."

The appellant did not object to any part of Dr. Petty's testimony and in no way raised the question of the hearsay nature of Dr. Petty's testimony. Appellant did not question the hospital procedures which Dr. Petty may have relied on to identify the body as that of Rainey Hughes, although there is no evidence that Dr. Petty did not personally know Rainey Hughes.

In addition, there is ample circumstantial evidence that the body examined by Dr. Petty was that of Rainey Hughes. The body was of a white male, 40 years old, estimated at 190 pounds, overweight, 65" in length, who died of a single gunshot wound in the chest. The examination took place at Marion County General Hospital on September 18, 1967, at 9:00 a.m. The doctor recovered a bullet from the body which he turned over to the Indianapolis Police Dept. and which he identified at trial as one he took from the body. Dr. Petty also found the blood alcohol level to be .11% at 10:00 a.m. on September 18th.

Rainey Hughes was a white male, 46 years old, 5'5" tall and overweight. Hughes was shot in the chest with a single bullet at around 8:00 p.m. on September 17, 1967, and taken to Marion County General Hospital, where he died around 2:00 a.m. on September 18th. He had been drinking a good deal prior to the shooting.

We think there was ample evidence that the body examined by Dr. Petty was that of Rainey Hughes.

C. Appellant argues that certain testimony of Mary Balay was hearsay and inadmissible in evidence. Appellant did not object to this testimony when offered at the trial,

nor did he at any time make a motion to strike it from the record. Therefore this issue is not before this Court on appeal. *Hardin* v. *State* (1970), —— Ind. ——, 257 N.E.2d 671.

D. Appellant says that the verdict was contrary to law because of jury misconduct. After the jury had been instructed and started to deliberate they returned to the courtroom and asked "Do we have to come to a decision?" The trial court instructed the jury to return and continue with their deliberations. Appellant says this episode shows that the verdict of guilty was not the fair and free expression of the opinion of all the jurors. We do not agree. The question by the jury shows that *at that time* they had not reached a unanimous verdict. The trial court merely told them to continue deliberating and there is no reason to believe that the jury was not properly instructed and functioning within those instructions. Appellant offered no affidavits nor evidence of any kind to support his argument. The burden is on appellant to show that the question by the jury and the trial court response was somehow prejudicial. *Williams* v. *State* (1923), 193 Ind. 670, 139 N.E.657. Appellant did not do so and we see no error here.

E. Appellant alleges that the indictment was defective because it did not charge appellant with first degree murder. The indictment reads:

> "The Grand Jury for the County of Marion in the State of Indiana, upon their oath do present that DONALD LEE MAXWELL on or about the 17th day of SEPTEMBER, A.D. 1967, at and in the County of Marion and in the State of Indiana, did then and there unlawfully, feloniously, purposely and with premeditated malice kill and murder RAINEY HUGHES, a human being, by then and there unlawfully, feloniously, purposely and with premediated malice shooting at and against the body of the said RAINEY

> HUGHES, with a certain gun loaded with gunpower and metal bullets, then and there held in the hand of the said DONALD LEE MAXWELL, and did then and there and thereby inflict mortal wounds in and upon the body of the said RAINEY HUGHES, of which mortal wounds the said RAINEY HUGHES then and there and thereby died; And so the Grand Jurors aforesaid, do say and charge that the said RAINEY HUGHES, in the manner and form and by the means aforesaid, unlawfully, feloniously, purposely and with premediated malice did kill and murder the said RAINEY HUGHES, then and there being."

Appellant contends that the portion after the semi-colon is the only important section, the previous part being surplusage, and it does not charge appellant with First Degree Murder.

We do not agree. It is clear from reading the indictment up to the concluding clause (upon which appellant relies) that the Grand Jury has charged appellant with commission of First Degree Murder of Rainey Hughes. It is equally clear that the first mention of Rainey Hughes in the concluding clause is a mere clerical error.

In *Kennedy* v. *State* (1878), 62 Ind. 136, an indictment charged *John* Kennedy with First Degree Murder. However, the concluding clause thereof named *Frank* Kennedy as the accused. Defendant's motion to quash was overruled, and on appeal he argued that the concluding clause was repugnant to the previous portion. In rejecting that argument, this Court stated:

> "The indictment is unnecessarily prolix. It was complete in its charges of the murder, without the addition of the last clause, commencing with the words, 'And so the jurors aforesaid', etc. . *That clause was mere surplusage.* See Bicknell Crim. Tr., pp. 256, 257.

It is manifest to any reader of the indictment that the word 'Frank' in the last clause is a mere clerical error.

"The repugnancy complained of is in the portion of the indictment which is surplusage. This fact brings the case clearly within the following provisions of the statute:

" 'No indictment or information may be quashed or set aside for any of the following defects: * * *

" 'Sixth. For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charges; nor

" 'Seventh. For any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant, upon the merits.' 2 R.S. 1876, p. 386, Sec. 61." (Emphasis added.)

The Sixth and Seventh clause of the 1876 statute were retained as clauses Sixth and Tenth of the present statute, Acts 1905, ch. 169 § 192, being Burns Ind. Stat. Ann. § 9-1127.

Thus, appellant's contention that all which precedes the concluding clause is surplusage is not supported by Indiana law. Rather, the law is to the contrary. Appellant was sufficiently apprised of the nature of the accusation so as to enable him to prepare his defense.

Judgement affirmed.

Hunter, C.J., Arterburn, And Givan, JJ. Concur

Jackson, J. Concurs in Result

APPENDIX "B"

(Supplemented and Corrected)

IN THE

Supreme Court of Indiana

DONALD LEE MAXWELL Appellant (Defendant below) vs. STATE OF INDIANA Appellee (Plaintiff below)	CAUSE NO. 769 S 153 APPEAL FROM MARION CRIMINAL COURT, DIVISION NO. 2

PETITION FOR REHEARING

Comes now the Appellant, Donald Lee Maxwell, by counsel and respectfully petitions the Supreme Court of Indiana to grant him rehearing in the above-entitled cause under the Court's Rule 11, and would represent to the Court that it erred in its opinion and decision in the following respects:

1. In asserting at Pages 1 and 2 of its Opinion certain "facts" which the Court asserts "tend to support the verdict". The first disputed "fact" asserted is that:

> "There was *animosity* between appellant and Rainey Hughes because Rainey's wife was *divorcing* him to marry appellant."
>
> (Our Emphasis)

The "fact" of a finding of "animosity" does not necessarily flow from the "fact" of an impending divorce. Moreover, it is at great odds with the following statement of "facts" appearing in the first paragraph of Page 2 of the Court's Opinion:

> "Appellant and Rainey drank together for several hours in an apparently friendly atmosphere. They talked about shooting each other in what one witness described as a joking manner and around 7:00 p.m. they used appellant's pistol to shoot at an oil can in back of the station."

The belated trial testimony of deceased's daughter (Mary Balay) regarding an alleged threat was inadmissible hearsay testimony contrary to all rulings precedent of the Court as will be further described herein. A further statement of "facts" by the Court (Opinion Page 2, paragraph 2) indicates:

> "At about this time appellant and Rainey were *definitely both under the influence of the whiskey* and Rainey said that he was sleepy and intended to go to his home five blocks away."
>
> (Our Emphasis)

If these "facts" recited by the Court, itself, be true; it would have been *impossible* for Donald Lee Maxwell to have ". . . purposely and with premeditated malice . . ." killed Rainey Hughes as required to be proven by the Indiana Statute describing the elements and penalty for First Degree Murder. In other words, Donald Lee Maxwell was in no physical condition to *form* either the requisite "intent" or to have killed with "premeditated malice". The Court's Opinion further rests upon admittedly questionable "facts" of an indeterminate alleged argument having taken place an indeterminate distance apart, but it (the Opinion) correctly reflects that:

> "At this point appellant shot Rainey Hughes in the chest with one shot from appellant's pistol. There was no struggle and Rainey Hughes was not harmed."

The "animosity" spoken about by this Court is not evident from the *facts of record* indicating that a shooting took place on business premises of which Donald Lee Maxwell was the proprietor, both the son and ex-son-in-law of deceased were there and then employed, and deceased was there of his own unhindered will. This Court erred in failing to find that prior to stating that "It (the shooting) was an accident", Donald Lee Maxwell stated "I'm sorry" and, of great significance, Officer Autrey stated that he had no reason to disbelieve Donald Lee Maxwell because Maxwell stood there and talked to Officer Autrey like an honest man. *This was the State of Indiana's own uncontroverted evidence!*

2. The Court erred in erroneously deciding Donald Lee Maxwell's first allegation of error (see Opinion Pages 2-5, inclusive, "A"). The Court states that it "will not weigh the evidence nor resolve questions of credibility"; however, as hereinbefore demonstrated in Rhetorical Paragraph 1, this Court had to weigh the evidence and it had to resolve questions of credibility in order to affirm. At page 3 of its Opinion, this Court states:

> "We can think of no clearer example of what it means to 'purposely' shoot another person, than the facts in this case."

If this mental process be true, it can also be stated with equal or greater logic that the State of Indiana's own *uncontroverted evidence* is the clearest example of what it means to "accidently" shoot another person! Note: "purpose" (by Donald Lee Maxwell) in this case is "assumed", "malice" is "inferred", and "premeditation" rests upon the testimony of a young negro named Robert Mann who

(see extensively quoted testimony at page 4 of the Opinion) described one too many "turns" in his testimony. In other words, a careful review of the testimony quoted by this Court indicates that witness Mann ended up with *his back* facing whatever event or events transpired between Donald Lee Maxwell and Rainey Hughes! The Court then erroneously digresses into a dissertation with respect to the "time interval" between the alleged "pointing" of a gun and the "pulling" of its trigger. This Court *admits* that ". . . there is not testimony as to how long this interval was . . .".

3. In finding with respect to the admissibility of testimony of Mary Balay that:

> "Appellant did not object to this testimony when offered at the trial, nor did he at any time make a motion to strike it from the record."

The record of this proceeding clearly reflects that trial counsel for Donald Lee Maxwell made six (6) separate and distinct objections to testimony given by Mary Balay (Tr. p. 229, l. 15; p. 230, l. 24; p. 231, l. 8; p. 231, l. 18; p. 232, l. 1 and, p. 233, l. 16). The trial court sustained five (5) of the six (6) "objections", but the highly prejudicial pattern of the several objectionable questions, in a manner of speaking, did the obvious damage of *proving* "premeditation" to the jurors. Therefore, the issue *is* before this Court on Appeal. It *is* one raising a substantial question. It *has been presented* in Appellant's Brief. And, this Court *has failed* to give a decision thereon! See Rhetorical Paragraph 2, hereinbefore and *Downum v. United States* (1963), 372 U.S. 734.

4. That this Court erroneously decided a question of first impression, in this: That the record of the proceedings presents a question of law that is also presented by

Appellant's Briefs, to-wit: *as a matter of law there was "jury misconduct"*. After the jury had been instructed and retired to deliberate they returned to the court room and asked "Do we have to come to a decision?" The Trial Court did not give a direct answer, but rather it instructed the jury to return and continue with their deliberations. The Trial Court's instruction to "return and continue with their deliberations" impliedly re-emphasised what is not the law of Indiana. The prejudice to Donald Lee Maxwell is obvious—*at least one juror, at that time, firmly believed in the innocence of Donald Lee Maxwell!* The question of law was decided erroneously by this Court in that it spoke of Maxwell's failure to offer "affidavits", (whatever that is supposed to mean) and that he failed to show prejudice.

5. In finding that the indictment, up to the concluding clause, charged Appellant with commission of the First Degree Murder of Rainey Hughes. This Court (Opinion Page 8) incorrectly quotes from the indictment. This Court shows a period (.) after the word "being" whereas, in fact, the indictment (Tr. p. 2) contains the following clause *after the word "being" and before the end of the sentence:*

> ". . . contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

Thus it is only the second and concluding clause which charges, if in fact there is any charge, a crime. The indictment ". . . up to the concluding clause . . ." *charges* nothing! It therefore does not follow that the concluding clause contains a mere harmless "clerical error".

6. In erroneously deciding, or failing to decide, and/or correctly so, each and every reason advanced by Donald Lee Maxwell for rehearing, the Court has thereby jointly

and severally denied Appellant Donald Lee Maxwell due process of law, both "procedural" and "substantive", under the respective Constitutions of the State of Indiana and the United States of America.

7. In failing to exercise its judicial authority to go beyond possible technical defects and *take notice* of "plain errors or defects affecting substantial rights". Cf. *United States v. Nikrasch* (1966), 367 F. 2d 740, 743.

Respectfully submitted,

/s/ Frederick J. Graf

Of Counsel for Appellant

Donald Lee Maxwell